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Governor's Work Group on Commercial Access to Government Electronic Records

ANSWER TO QUESTION 3

Unwinding Taxpayer Subsidy to Commercial Access While Ensuring Public Access

If public records in electronic format are to be released for business or commercial purposes, how should the state allocate and recover costs?

I. Introduction.

The allocation and recovery of costs related to commercial access represent important and controversial public policy issues, perhaps second only to those raised by questions of personal privacy. To be clear, the Work Group affirms that taxpayers should not pay to inspect information collected by government at taxpayer's expense. Nor should charges for commercial access be used as a financial disincentive to limit the accountability of public institutions.

The Work Group also believes that any cost recovery for commercial access must be based on allocating costs related to providing enhanced access -- not the 'selling' of public records. In the Work Group's view, cost recovery for commercial access is not ultimately about generating new revenues -- it is about being deliberate about what should be subsidized by tax dollars.

The allocation of costs associated with building and maintaining public electronic delivery systems for government information is an overriding concern of both government agencies and consumers. Government decision-makers are rightly concerned that the costs associated with building and maintaining public electronic delivery systems do not overly burden already scarce government resources. Government and citizens are rightly concerned that electronic access to government information not impose greater costs to the end user, potentially widening the gap between the so-called "information haves" and "have nots" based on their ability to pay[1].

[1] See, e.g., "A New Divide Between Have and Have-Nots?" Time Magazine On-Line at the URL: http://www.pathfinder.com/@@zRNJdwAAAAAAADgA/time/magazine/domestic/1995/special/special.society.html; "Principles on Public Information/Request for Comments," 60 Fed. Reg. 30609 (National Commission on Libraries and Information Science 1995).

In recent years, Washington State policy makers have been grappling with these funding issues. In 1994, the Legislature created the Public Information Access Policy Task Force,[2] to address public electronic access issues and recommend strategies for widespread electronic public access to government information. In its final report, the Task Force urged the Legislature to "clarify and resolve remaining costs, funding, and fees issues."[3]

For its part, the current Work Group was asked to address the narrow issue of cost recovery only as it relates to commercial access to government electronic records. The Work Group is concerned that policies that mandate that electronic government information be provided at low or no cost to commercial interests would in effect provide a substantial and largely invisible taxpayer subsidy of those commercial enterprises -- even where most taxpayers will not use the electronic services and thus receive no offsetting public benefit.

The Work Group believes that state information policies must balance the goals of broad electronic public access to government information with the government's need for such services to be economically viable, recognizing that electronic delivery systems will not develop fully without adequate provisions for cost recovery. Of course, where the Legislature makes a specific finding that a particular electronic service serves a broad public constituency and a compelling public interest, it can surely choose to fund services through legislative appropriations and not through user fees. However, where such funds have not been allocated, it is wholly appropriate for the state to consider cost recovery options for commercial release

II. Public Stewardship in a Changing Environment

Data collected by the government and maintained in electronic format is the great undeveloped public resource of the twenty-first Century. It was created through public investment in technological infrastructure and it belongs to the people. The people have a fundamental right to the data for personal use and to monitor their government. To state it plainly, government must not interfere with individual access to data or access by the public for public purposes.

However, government must also realize that data is the means of production in an information society. Failure to recognize the economic value of data and to develop policies to ensure equitable exploitation will result in huge profits for a few at the expense of many.

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[2] 1994 Wash. Laws Ch. 40, codified at Wash. Rev. Code 42.17.261 (1994).

[3] Public Information Access Policy Task Force, *Report and Recommendations: Encourgaing Widespread Public Electronic Access to Public Records and Information Held by State and Local Governments* December 1, 1995: 16.

It seems reasonable that government recover the cost associated with keeping data and the infrastructure that supports it current and useful. Without a coordinated and thoughtful policy on commercial access to government electronic records, government will continue to give away valuable public resources. Without public debate and a well-considered policy, twenty-first Century taxpayers will continue to lose their public assets with the quiet efficiency only computer systems can produce.

The stakes in the new economy are enormous. By one estimate, sales of digital information in the United States generated $9.2-billion in 1990.[4] This industry, which has grown exponentially this decade with the advances in networked technology, does not need a taxpayer subsidy. Yet that is the effect of commercial release as it is now structured in many instances. As early adopters of new technologies, commercial interests benefit disproportionately from electronic information systems developed by government on behalf of the public. The subsidy is both large and largely invisible. It is reasonable to expect that taxpayers would receive some return on their investment when the IT systems built on their behalf are used for private gain.

At the same time, public policy makers must resist the temptation to reverse the trend by establishing rates that are punitive to private sector commercial interests. As has been established in the discussion of the first question, "legitimate business use" of public records provides some degree of public benefit. It is counterproductive to drive commercial providers out of a legitimate business use that furthers a public mission -- directly or indirectly.

The key in this discussion is balance -- a balance that results in what one witness called a "win-win-win" for government, business and the public. If the rate card skews high, business loses its motivation for being involved in such enterprises. If the rate card skews low, subsidies to commercial interests draw resources away from other government functions. A balanced rate card -- where taxpayer subsidies to the commercial sector are unwound -- provides equal commercial access to all competitors, furthers a public mission and eases demands on tax revenues.

III. Models for Cost Recovery

"Cost recovery" has been used in its generic sense by the Work Group and in the Governor's veto messages. It serves as a succinct shorthand for efforts to do what the terms suggests -- recover the costs associated with providing information. In principle, an agency would recover all its costs and not draw resources away from its legislatively-mandated mission. In practice, full cost recovery is illusive. As documented in the agency survey conducted by the Work Group, agencies are able to offset costs to one degree or another but none are able to realize full cost recovery.

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[4] 2. Ian Rowlands, "The Public-Private Debate Revisited," *Library and Information Research News* Vol. 15 No. 54. (Summer, 1992), p. 24.

Some have contended that statutory provisions[5] prevent agencies from realizing full cost recovery, although there is an allowance for agencies to levy additional charges if they can be justified. That this allowance for justifying additional charges has gone virtually unused may point to a larger problem with which the information sector is still grappling.

Simply put, we do not know enough about information as an economic unit. The problem, according to Peter F. Drucker, is:

> [H]ow knowledge behaves as an economic resource, we do not yet fully understand; we have not had enough experience to formulate a theory to test it... We can, of course, estimate how much it costs to produce and distribute knowledge. But how much is produced ... we cannot say.[6]

Given the ambiguity concerning information as an economic resource, it may be helpful to be more precise in those areas where there is greater historic understanding. The shorthand of cost recovery does not allow a detailed understanding of the many approaches to assessing the value of information in an open economy.

With the assistance of experts from the industry and the academy, the Work Group engaged in wide-ranging discussion of funding options. The discussion that follows shifts the focus from cost recovery as a shorthand for an all encompassing public policy objective to cost recovery as one of a number of approaches to be considered in attempting to reach that broader objective.

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[5] RCW 42.17.260 states:

> (7) Each agency shall establish, maintain, and make available for public inspection and copying a statement of the actual per page cost or other costs, if any, that it charges for providing photocopies of public records and a statement of the factors and manner used to determine the actual per page cost or other costs, if any.
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> (a) In determining the actual per page cost for providing photocopies of public records, an agency may include all costs directly incident to copying such public records including the actual cost of the paper and the per page cost for use of agency copying equipment. In determining other actual costs for providing photocopies of public records, an agency may include all costs directly incident to shipping such public records, including the cost of postage or delivery charges and the cost of any container or envelope used.
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> (b) In determining the actual per page cost or other costs for providing copies of public records, an agency may not include staff salaries, benefits, or other general administrative or overhead charges, unless those costs are directly related to the actual cost of copying the public records. Staff time to copy and mail the requested public records may be included in an agency's costs.
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> (8) An agency need not calculate the actual per page cost or other costs it charges for providing photocopies of public records if to do so would be unduly burdensome, but in that event: The agency may not charge in excess of fifteen cents per page for photocopies of public records or for the use of agency equipment to photocopy public records and the actual postage or delivery charge and the cost of any container or envelope used to mail the public records to the requestor.

[6] Peter F. Drucker, *Post-Capitalist Society*, New York: Harper Business: 1993: 183, 185.

1. No Cost

Some agencies choose not to charge for information. The proliferation of agency home pages on the World Wide Web testifies to a concerted effort to communicate with the public at no cost in the electronic environment. A no-charge strategy can be effective in advancing an agency's policy objectives -- particularly as they relate to public access and public information efforts.

However, the no cost alternative for commercial access represents the highest possible level of taxpayer subsidy of business interests.

2. Cost Recovery

Cost recovery, narrowly defined here as a model for setting a fee schedule, bases pricing on the cost of production. The calculation includes the costs of making copies and handling charges. It may also include system development costs and data conversion costs. In some jurisdictions, system maintenance costs are included in the calculation.

In Washington State, cost recovery for public access is confined largely to the cost of copying and related staff time.

The Work Group's survey of current practices documented widespread concern among agencies about cost recovery as it relates to commercial access. Agencies are concerned that cost recovery does not account for the need to stay abreast of technological advances over time. Cost recovery that is tied exclusively to the cost of production even for commercial access effectively precludes system refurbishment and improvements -- the very improvements needed to meet the increasingly sophisticated demands of commercial users.

Agencies also reported difficulties in adapting a cost recovery approach rooted in assumptions from paper-based records management to the new electronic environment. Fully 41 percent of respondents reported difficulty in tracking actual costs -- including staff and computer processing time -- for all phases of processing a request.

3. Value Pricing

Value pricing recognizes that users -- particularly business users in the case of commercial access -- all have different information needs and different resources. Under value pricing, rates are set based on the "value connected with the subjective evaluations of the individual information-seeker assessing how adequately the information content

consulted meets his expectations and to what extent it is capable of satisfying his information needs."[7]

The subjective assessments by business users extend beyond supply and demand -- and are based on convenience, the availability of alternatives and the benefits of the value-added information compared to other costs of doing business.

Value pricing has become a popular approach with the rise of digital technologies. Digital information often has more value to commercial users than the paper-based equivalent because of its malleability. Information in digital form can be easily customized to meet specific needs -- and made available on demand, seven days a week, 24 hours a day.

The premiums associated with value pricing are often attractive to business users when compared to the costs of available alternatives. Despite initial resistance in some cases, testimony before the Work Group indicated that business users come to favor value pricing for the added convenience and, ultimately, cost savings. Online, on demand retrieval of records necessary for conducting business -- even when value priced -- cost a fraction of the cost of couriers and lost time associated with manual retrieval. In other words, the marginal costs to business of enhanced electronic access to government records often reduces the cost of doing business. For example, the adoption of value pricing reduced the cost of receiving certain court records for a large-volume business user (Dunn and Bradstreet) from $1.00 per judgement to 40 cents.

In the Work Group's view, value pricing of information would be appropriate only in the context of commercial access. If the Legislature were to consider this model, it should include provisions whereby the revenues from value pricing for commercial access would be reapplied to support public access and refurbishing infrastructure.

4. Public-Private Partnerships

In testimony before the Work Group, commercial interests expressed the concern that public entities may have an unfair competitive advantage because of the their legislative monopoly over data collection.

A number of states and local governments have found innovative ways to address this concern. As a recent article in *Records Management Quarterly* notes, "One policy option that seems to give publicly-funded agencies the advantages of selling information without the possibility of raising questions about unfair competitive practices is to have

[7] Reijo Savolainen, "Fee or Free?: The Socio-economic dimensions of the charging dilemma," *Journal of Information Science* 16 (1990): 146.

publicly-funded organizations sell their information by-products to consumers through a private sector agent."[8]

A model pioneered in Kansas[9] has been adopted by Indiana,[10] Arkansas,[11] and Nebraska.[12] An existing initiative in Georgia[13] is being refashioned around this model. Similar approaches are employed in New Mexico and by local governments in California.

The key characteristics of this model include:

- **PUBLIC-PRIVATE PARTNERSHIP:** The model relies on a public-private partnership that uses private capital, private employees and private initiative to expand government services. The model uses public regulation to safeguard the public's interest from unfair monopoly or exploitation.
- **CENTRALIZED BUT NON-EXCLUSIVE:** The private partner has a non-exclusive license for state agency access. For their part, state agencies are able to refer inquiries to a central clearinghouse, thereby removing a significant workload from public servants. The central clearinghouse is a shared statewide resource that prevents duplicative and wasteful efforts by individual agencies to set up separate information access systems.
- **ENHANCED AND EQUAL COMMERCIAL ACCESS:** The entities created by this model do not sell information, they sell enhanced access to public information. Commercial for-profit information resellers become customers -- not competitors -- of the partnership. Under such a plan, all of the commercial resellers enjoy equal access to the clearinghouse.
- **CONVENIENCE:** Commercial subscribers are willing to pay for the convenience and immediacy of accurate state public information -- on an on-demand, as needed basis.
- **AGENCY CONTROL:** Public entities remain in control of their data. The partnership agreement does not change the ownership of, or control over, public records.
- **PUBLIC ACCOUNTABILITY:** Under partnership agreements, the state retains oversight of the clearinghouse but relinquishes day-to-day operation to the private partner. The partnership is constituted with a balanced board that represents public agencies, the private partner and users. The board works to anticipate and resolve problems.
- **ENHANCED PUBLIC ACCESS:** Public access to public information by electronic means is enhanced by the use of a properly managed public network. The network (or clearinghouse) provides public access to information for free -- which really means it is

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[8] Victoria Lemieux, Selling information: what records managers should know, *Records Management Quarterly*, Vol. 30 ; No. 1 ; Pg. 3.
[9] Information Network of Kansas
[10] Access Indiana Information Network
[11] Information Network of Arkansas
[12] Nebrask@ Online
[13] GeorgiaNet

subsidized by commercial access. For example, Access Indiana provides free access to 10,000 pages of information based on revenues from 15 pages for which there is a surcharge.

In testimony, Dr. Mark Haselkorn, Chair of the Department of Technical Communication within the College of Engineering at the University of Washington, told the Work Group that public-private partnerships focus attention on the question of "value" -- where it resides, how it is added, by whom and under what circumstances. Partnerships effectively recast public infrastructure as a development environment for commercial interests that seek to repurpose public information. According to Haselkorn, in every case where products and services that rely on taxpayer-supplied infrastructure are brought to market, the relationship should be structured as a public-private partnership.

In related testimony before the Work Group, John Doktor of the Public Sector Marketing Group said that a successful partnership requires both parties to recognize what each brings to the relationship. The public entity must guard against seeing the partnership solely in terms of an opportunity to shift risk to the private partner. For its part, the private partner must acknowledge the value that government brings to the relationship. The public entity is steward of unique, authoritative records -- not simply a "raw resource" -- and has an intimate knowledge of the collected data and the systems that support it.

Doktor, a self-described proponent of value pricing for commercial access, also told the Work Group that partnerships do not necessarily mean that risks and rewards are shared equally. Typically, greater risk is assumed by one or the other partner. In such cases, the risk-bearing partner is allocated 80 percent of the benefit. Importantly, the other partner still receives 20 percent of the benefit, with any financial returns tied to the success of the partnership.

Washington State is clearly not alone in its efforts to adopt policies within its public mission that also reflect the fundamental shifts that come with the emerging information-based economy.

The Work Group also believes that there are two conventional economic models that are not consistent with proper public stewardship of public records -- optimal and marginal cost pricing.

- **Optimal Pricing** assigns value to information based on what the market will bear -- with no consideration given to the cost of producing the product or non-monetary benefits of moderating the cost. The appropriateness of such a market-driven approach in the context of an agency's public mission is suspect. Further, a strategy to maximize profits (while wholly appropriate in the private sector) does not fit well with the primary public-sector motivation for commercial access -- that is, generating revenue to maintain or improve service levels.

- **Marginal Cost Pricing** also focuses on what the market will bear, calculating that the marginal cost of producing an additional unit of a product is equal to the amount of additional revenue that is to be gained by selling an additional unit. Unlike optimal pricing, marginal cost pricing does account for the cost of production but does not lend itself to the public purpose dynamic at the core of public records management.

The Work Group encourages the Legislature to incorporate structures that protect and promote the value of public infrastructure to the commercial information sector.

Until such time that information is better understood as an economic unit, public entities can mitigate risk by taking at least four steps:

1. Contracts with the private-sector information should be non-exclusive in nature. Exclusive contractual arrangement may thwart innovation and competition in the private sector.

2. Contracts should have a limited time horizon. Long term contracts limit government's ability to adapt to change and correct oversights in the original arrangement.

3. Contracts should contain certain safeguards on personally identifiable information, with sanctions clearly articulated.

4. Contracts should not confer ownership or control of public records on any third party. Public records are held as a public trust and government, as steward, must have control of the data.

IV. Distinguishing Records from Delivery

The creation of documents should be distinguished from their delivery. The government is the public trustee of all records it creates or maintains. Under the Washington State Public Disclosure Act, an initiative approved by voters in 1972, a person has the right to examine all state public records except those that fall into categories specifically exempted from disclosure.[14] The creation of those documents is

[14] As amended in 1992, the Act states:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. The public records subdivision of this chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy.

Wash. Rev. Code 42.17.251 (1994). The Act exempts from disclosure 33 categories of government documents, including personal information in files of public school students, hospital patients, welfare

publicly financed insofar as citizens have paid for the public office, personnel, pencils, paper, and computers to make them. Having paid for them once, it is appropriate that the public be entitled, as it is under the Public Disclosure Act, to inspect the records at no cost.[15]

By contrast, reproduction and delivery of government data and information present their own cost considerations. With regard to reproduction, Washington law specifically authorizes agencies to impose "a reasonable charge for providing copies of public records and the use by any person of agency equipment to copy public records, which charges shall not exceed the amount necessary to reimburse the agency for actual costs of the copying."[16] With regard to delivery, current state law requires agencies to "honor requests received by mail,"[17] but does not require them to absorb the costs of photocopying or delivering the information to the requester. Although most agencies absorb postage costs for all but the most voluminous requests, they generally do not pay the delivery costs where a requester elects, for example, to use courier service, overnight mail, or fax to ensure faster delivery. Electronic access is, like a courier service, a speedier and more convenient form of delivery.

It appears from the context of the Public Disclosure Act that "actual costs" as used therein *does* refer to incremental costs of processing requests for public records. A 1991 Washington Attorney General's opinion stated that actual costs as used in the Act "could include such items as the costs of the copying machine (*including maintenance*); paper and other supplies; *and staff time devoted to the copying process*. The agency must be able to justify its charges based on these and other direct costs."[18] The same opinion found that records search fees were not allowable, since they were not "incidental to copying," but pertained to inspection of public records. "[I]t would be incongruous to impose search fees as 'incidental' to copying, when inspection of those same records must be free."[19] This opinion, then, makes a clear distinction between inspection of public records, which is free, and obtaining copies, which is not.

Moreover, while the Public Records Act makes clear that electronic records are public records,[20] it does not mandate that government provide for inspection in the most

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recipients, public agency employees and appointed or elected officials. See, e.g., Wash. Rev. Code 42.17.310 (1994).

[15] Wash. Rev. Code 42.17.300 (1994).

[16] Id.

[17] Wash. Rev. Code 42.17.270 (1994).

[18] Public Records -- Initiative No. 276, 1991 Op. Att'y Gen. 6, at 6 (emphasis added). Amendments since the opinion impose a 15 cent per page limit.

[19] Id. at 5-6.

[20] Wash. Rev. Code 42.17.020(27) defines "Public record" as including "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Wash. Rev. Code 42.17.020(29), in turn, defines "writing" to mean "every ... means of recording any form of communication or representation, including, but not limited to, words, pictures, sounds or symbols, or combinations thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film, and video recordings, magnetic or punched cards, discs, drums,

convenient manner regardless of costs. Washington law requires only that "[r]esponses to requests for public records shall be made promptly by agencies."[21] The Attorney General has stated that in determining whether an agency has responded "promptly" to a document request -- including the steps of "deleting or redacting the portions of each record that the agency determines should be withheld from disclosure" -- "courts will take into account the agency's resources, the nature of the request and the content of the records requested."[22] Where an agency's resources do not allow for electronic public delivery systems, or where they do not provide for firewalls on systems initially designed for internal agency use, the less-costly process of manually redacting records is legally sufficient, even though it may be far less prompt and less convenient to the requester. From this perspective, electronic redaction goes to the convenience of delivery, not to the search and inspection of public records. Once again, a policy which bars an agency from recouping funding for the necessary security components of an information system undermines the agencies' ability to develop these more convenient information systems in the first place.

Of course, where an agency uses an information service for both internal use and public electronic access, it should separate the costs of each. For example, if an agency has a photocopier for internal use, but uses this machine to copy a document in responding to an open records request, the incremental costs would only reflect the actual cost of the paper, ink and toner used for the photocopy, and that percentage of the cost and maintenance of the photocopier directly apportionable to satisfying the documents request, and not attributable to the agency as overhead for its internal operations. However, if a government's internal operations do not require a public access component, the additional costs of developing the system to accommodate public access must also be included within incremental costs. James Love of the Washington, D.C.-based Taxpayer Assets Project notes that where governments' internal needs would be met without public access services, incremental costs of providing public access would be explained in the equation $IC_P = C(P,G) - C(G)$, where C (P,G) is the cost of both the internal use (G) and public access (P), and C(G) is the cost of internal use only.[23] Under this equation, the costs of public interfaces, firewalls, and other components which must be added to provide public electronic access, all come within incremental costs.

Delivery can take many forms, from first-class mail delivery of paper or electronic documents (e.g., on disk or cartridge) to electronic delivery over the most costly computer networking systems. While there are potential public benefits that may stem from

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diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated."

[21] Wash. Rev. Code 42.17.320 (1994).

[22] 1991 Op. Att'y Gen. 6, at 4.

[23] James Love, "Pricing Government Information," *Jrl. of Govt. Information* 22, no. 5 (1995): 363-387. The ACLU of Washington calls for a careful accounting of incremental costs, but would allow the imposition of user fees to cover them. "[I]f fees must be charged, the total revenue must be no greater than sufficient to cover the incremental costs of providing electronic or other new forms of access." ACLU of Washington, *Policy on On-Line Access to Government Information*, July 17, 1993 (hereafter "ACLU Policy") at 2.

electronic delivery of government records, it does not follow that *all* electronic delivery systems need be made available to *all* citizens in *all* cases to further either the general public interest or a specific government objective. Where particular delivery systems would primarily serve a narrow constituency, and not the public as a whole, a fee recovery mechanism may be appropriate. Even where a system may have a broader public demand, user fees may be appropriate so long as they do not work to create improper barriers to public access.

V. Unwinding Public Subsidies to Commercial Interests

There is no such thing as "free" electronic access. The design, development, deployment, and refurbishment of public electronic delivery systems require significant investments[24] which must come from some source, whether it is a private grant, legislative appropriation, existing agency budget, or user fee. Determining the appropriate kinds of electronic delivery to provide requires an assessment of the specific government objective, the extent and nature of consumer demand, and the best and most cost-efficient technology for the job.

A. Demand for Government Information.

Beyond specific categories where widespread public demand is readily acknowledged, there is often little widespread public demand for particular kinds of information; what additional demand that exists comes from narrow and specific constituencies, usually commercial entities seeking information for resale or attorneys seeking information for litigation purposes.

In 1994, a survey by the Office of Financial Management reported that 59 percent of state agencies surveyed reported requests for data for commercial purposes, while 47 percent have received requests for litigation purposes.[25] In 1996, the Work Group survey found that 85 percent of state agencies surveyed reported requests for data for commercial purposes, while 68 percent have received requests for litigation purposes

Cost recovery, then, should focus on these regular commercial users. For example, large commercial users (who are often resellers of government information) directly invest substantial funds to acquire, format, analyze, and distribute government information over broad geographic areas to a diverse customer base. In addition, specialty commercial resellers of public records invest in highly targeted categories of records to format, analyze, and provide information to a highly select customer base. These users require specialized analysis that is generally of a commercial nature and has a high

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[24] For example, the costs of making portions of an internal legislative database available to the public exceeded $75,000, and requires another $58,000 annually to cover operating costs. Washington State Legislative Service Center, *A Briefing on the Legislature's Public Access Systems*, January 1995.

[25] Helberg Memo, *supra* at n. 18.

financial value; they add value through their understanding of the specific business needs of the select customer base to which they provide service. In each case, the costs of electronic delivery of the raw government data has a high commercial value to a specific audience, but very little to the larger public.

Agencies should not be precluded from developing sustainable fee-based services for the commercial sector where a broad public interest that would justify public funding has not been established. In these cases, direct fees to users are the fairer form of recovering costs, since only those who use a service are burdened with paying for it. By contrast, direct public funding of electronic delivery systems may be inappropriate, since in many cases it would be a taxpayer subsidy to commercial entities who use government information for profit.

B. Availability of Legislative Funding.

Public subsidies require allocations of scarce resources. They are used most widely to support the legislatively-mandated missions of state agencies. The Legislature must be increasingly deliberate in choosing where to target its allocations. Given spending restrictions placed on state government, subsidies to commercial access may come at the expense of other government services.

First, to provide appropriations for electronic access without reducing funds for other government programs assumes an increase in total government funding. Where there is no growth in state funding, appropriations for electronic delivery of government information must be made at the expense of existing programs. Indeed, Washington State is currently subject to the limits of Initiative 601, passed by voters in 1994, which limits the amount of money the Washington Legislature can spend without turning to the voters for approval. In its first 18 months, it bans any tax increase without a public vote. After that, it establishes a spending cap for state government -- based on a formula which factors in population growth and inflation -- and requires a supermajority of the Legislature (60 percent) and voter approval to exceed the cap.[26] In this environment, agencies which seek legislative appropriations to provide such new services in effect ask the government to take attention and resources away from existing projects. Even were Washington not subject to Initiative 601, it must be recognized that electronic access is not a service that has traditionally been provided by government, and therefore it is unlikely that the Legislature would significantly decrease funding for existing programs to make room for the now-higher priority electronic access projects. In this environment, electronic access services will simply not be developed or implemented.

Second, where development and deployment of services is wholly dependent upon legislative appropriations, there is no certainty that funding, even if approved one year, will be sustained in the next. Several examples are illustrative. In Hawaii, the Legislature in 1995 terminated the Hawaii Interactive Network Corporation, or "Hawaii INC," a

[26] B. Ellis, "Washington Splits in Tax Initiatives," The (Portland) Oregonian, Nov. 3, 1993: A1.

publicly-owned gateway and videotex service, citing high costs.[27] In California, the Legislature defunded the Info/California electronic kiosk project, citing high costs and dissatisfaction with content.[28] Contrast these struggling initiatives with the burgeoning public-private partnerships discussed above in Kansas, Indiana, Arkansas and Nebraska that serve multiple constituencies through a system whereby commercial access cross-subsidizes public access.

VI. Ensuring That Fees Do Not Inhibit Public Access.

The objectives of public electronic access, as set forth by the Legislature,[29] are not incompatible with direct assessment of fees on users. The goals of government efficiency, strategic management of government resources, and citizen access may best be assured by a policy that recognizes the need for agency flexibility in developing sustainable funding mechanisms, but which assures that such mechanisms do not create undue barriers to the public's ability to use electronic delivery service, either by charging fees that make the services unaffordable to most users or by requiring that they have expensive equipment to access them. Rather than limit user fees outright, state policy should set forth criteria to provide guidance to agencies considering user fees to ensure that the public's interest in such services is protected.

Specifically, agency determinations of fees for electronic access services should address three basic points: First, the establishment of fee-based electronic services must be viewed as an addition to, and not a substitute for, free non-electronic access to government records now provided under the Public Disclosure Act. Second, where fees are assessed, fee structures should be determined with a limited goal of achieving sustainable funding for the service itself (including regular upgrading and refurbishment of public infrastructure), and not of providing an additional revenue source for unrelated agency activities. Such a cap seeks to ensure that fee structures do not unduly preclude access to significant numbers of users, especially non-profit organizations and individuals. Third, any electronic access delivery mechanism should provide some level of free electronic access through terminals or kiosks located in public facilities such as schools or libraries. A policy encompassing these points would allow governments to develop potentially sustainable sources of funding for services which allow them to recover agency

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[27] V. Viotti, "Budget cuts force Hawaii INC to close," Honolulu Advertiser, July 26, 1995: 1.

[28] D. Bernstein, "Agencies That Escape Cuts Despite Loud, Long Criticism," Sacramento Bee, April 24, 1995: A11.

[29] The Legislature found

> that government information is a strategic resource and needs to be managed as such and that broad public access to non-restricted public information and records must be guaranteed. The legislature further finds that reengineering government processes along with capitalizing in advancements made in digital technology can build greater efficiencies in government service delivery. The legislature further finds that providing citizen electronic access to presently available public documents will allow increased citizen involvement in state policies and empower citizens to participate in state policy decision making.

Wash. Rev. Code 42.17.261 (1994).

costs and, at the same time, further public goals of electronic access by subsidizing and improving low-cost or no-cost access services.

There are several ways to structure user fees to mitigate further the concern that electronic delivery of government information will be unavailable to citizens who need it. For example, agencies may establish graduated fee schedules based on the volume of use, so as to allow less expensive access to occasional or low-volume users. They may also vary fees according to the time of day a service is accessed, such as setting lower fees after nine-to-five working hours or on weekends.

The most common way is to establish differential pricing which imposes higher fees on high-volume commercial customers than on others. The American Civil Liberties Union (ACLU) of Washington recommended to the Public Access Information Policy Task Force that fees for commercial users cross-subsidize public access by individuals, non-profit organizations, and schools. "Fees charged to large volume commercial users may be greater than the cost of providing access to those users, as long as the surplus is used to subsidize access to those exempted from fees."[30] Jane Nelson, administrator for the Washington courts and a former Task Force member, has also noted that "wide-scale and inexpensive public access ... may require outlays of funds for equipment which could be financed by charging commercial enterprises higher prices for 'wholesale' access."[31] Indeed, such user fees for commercial entities could go far to implement the earlier Task Force's call for the public to have "at least one avenue of no cost access to the highest caliber version of any publicly funded government information system that serves an outside constituency, perhaps through access to the state's officially designated depository libraries."[32]

Reasonable and standardized user fees dedicated to improving public electronic information services would not impose undue economic burdens on commercial concerns. For one thing, these companies generally pass the fees on to their commercial customers. For another, they would still have the option of obtaining documents or electronic records through mail or in person, or, depending on the fee structure, through after-five or weekend access when user fees might be lower. In any event, where user fees are limited to the development, maintenance, and refurbishment costs of public electronic services, it can also be expected that in many cases fees would decline over time as the government recovers its development costs.

Conclusion

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[30] ACLU Policy, at 2.

[31] Jane W. Nelson, "The Public's Records: Public Records Policy in the Information Age," presented to the American Association of Law Librarians, July 31, 1995.

[32] Final Report, at 8.

In answering the question, *If public records in electronic format are to be released for business or commercial purposes, how should the state allocate and recover costs?*, the Work Group finds:

- taxpayers should not pay to inspect information collected by government at taxpayer's expense.
- financial disincentives should not be used to restrict access to government.
- cost recovery is based on providing enhanced access, not the 'selling' of public records.
- requiring agencies to provide electronic delivery of information at below incremental cost potentially retards the development of new systems since there is no ready funding source for the development, enhancement and eventual refurbishment of the networked infrastructure that makes commercial access possible.
- government must be deliberate in developing a model for cost recovery that provides for sharing risks and sharing rewards.
- government is not a passive holder of information, but a development environment which adds value to the information that is ultimately of commercial interest.
- providing low- or no- cost access to commercial enterprises would effectively provide a substantial and largely invisible taxpayer subsidy of those enterprises -- even where most taxpayers will not use the electronic services and thus receive no offsetting public benefit.
- public-private partnerships, where the value added by both partners is recognized, may be an effective means of unwinding taxpayer subsidies of commercial enterprises.